

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

KEN OLSON,

Plaintiff and Appellant,

v.

WILLIAM SARDI,

Defendant and Respondent.

E071991

(Super.Ct.No. CIVDS1819080)

OPINION

APPEAL from the Superior Court of San Bernardino County. Bryan Foster,
Judge. Affirmed.

Ken Olson, Plaintiff and Appellant in pro. per.

No appearance for Defendant and Respondent.

Plaintiff Ken Olson provided counseling services to the son of defendant William Sardi. A family law court removed the son from Sardi's custody, citing Sardi's violations of court orders, but also citing a letter report that it had received from Olson. Sardi then posted a negative review of Olson on Yelp, saying, among other things, that Olson "wrote letters to the family court . . . that got my son taken away from me."

Olson filed this action against Sardi, asserting causes of action, including one for defamation, arising out of the Yelp review. The trial court granted Sardi's "anti-SLAPP" motion (§ 425.16)¹ and awarded him attorney fees.

Olson appeals. We find no error. We will hold that reviewing Olson on Yelp was a protected activity, and that Olson failed to show a probability of prevailing. We will also hold that he has not shown that the trial court's award of attorney fees was an abuse of discretion. Hence, we will affirm.

I

FACTUAL BACKGROUND

The following facts were shown by the declarations filed in connection with the anti-SLAPP motion.²

Olson is a counselor affiliated with Olive Branch Counseling Centers (Olive Branch). According to Sardi, Olson advertises online, including on Yelp and Facebook. Olson has denied (although not under oath) that he advertises on Yelp.

Sardi filed for a divorce. He and his wife have one son. According to Sardi, the family law court appointed Olson as an expert. (See Evid. Code, § 730.) According to

¹ This and all further statutory citations are to the Code of Civil Procedure, unless otherwise indicated.

² Sardi filed a cross-complaint against Olson. The declaration in support of Sardi's anti-SLAPP motion included material that was relevant exclusively to the cross-complaint and irrelevant to the motion. Perhaps for this reason, much of Olson's statement of facts is devoted to denying the allegations of the cross-complaint. We disregard all such facts because they are irrelevant.

Olson, however, the court did not appoint him; rather, it ordered the Sardis to obtain counseling for their son, and the Sardis chose him.³

In January 2018, Olson submitted a report in the form of a letter to the family law court. In March 2018, the family law court awarded Mrs. Sardi sole legal custody and primary physical custody of the parties' son. It cited Sardi's violation of court orders. However, it also cited Olson's letter, which it described as "most disturbing with respect to the comments made by [the son] to Mr. Olson about [Sardi], . . . none of which . . . are positive."

Sardi promptly posted the following Yelp review of Olive Branch:

"Ken Olson took sides with my ex-wife who used her tears to sway him and he wrote letters to the family court on her behalf that got my son taken away from me. Ken Olson refuses to read any emails I send him. He attempts to become a surrogate father to my son which is disturbing for any dad. My son really hates going to his counseling sessions but his angry mother keeps paying him to do her bidding. My son says Mr. Olson continues to try to dig up negative information about his father so he can use it against the father in court. You don't want this mercenary counselor. Other [*sic*] say it: he deserves a zero rating."

³ In his complaint, however, Olson alleged that the court had referred Sardi to Olson's counseling agency.

Many of Olive Branch’s other Yelp reviews were similarly negative. On the same day as Olson filed this action, he also filed actions against two other people. Olson concedes that those actions, too, were based on negative Yelp reviews.

II

PROCEDURAL BACKGROUND

Olson asserts causes of action for defamation, negligence, intentional interference with prospective economic advantage, and an injunction, all based on the Yelp review.

III

THE TRIAL COURT PROPERLY GRANTED THE ANTI-SLAPP MOTION

A. *General Legal Principles.*

Sardi has not filed a respondent’s brief. “‘Nonetheless, [Olson] still bears the “affirmative burden to show error whether or not the respondent’s brief has been filed,” and we “examine the record and reverse only if prejudicial error is found.”’ [Citation.]” (*City of Desert Hot Springs v. Valenti* (2019) 43 Cal.App.5th 788, 792, fn. 5.)

“[S]ection 425.16 . . . , commonly known as the anti-SLAPP statute, allows defendants to request early judicial screening of legal claims targeting free speech or petitioning activities.” (*Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 880-881.)

It provides: “A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be

subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.”

(§ 425.16, subd. (b)(1).)

“A court evaluates an anti-SLAPP motion in two steps. ‘Initially, the moving defendant bears the burden of establishing that the challenged allegations or claims “aris[e] from” protected activity in which the defendant has engaged. [Citations.] If the defendant carries its burden, the plaintiff must then demonstrate its claims have at least “minimal merit.”’ [Citation.] If the plaintiff fails to meet that burden, the court will strike the claim.” (*Wilson v. Cable News Network, Inc.*, *supra*, 7 Cal.5th at pp. 883-884.) “To the extent there is any doubt, we construe the statute broadly to achieve its purposes. [Citation.]” (*Id.* at p. 900.)

“The grant or denial of an anti-SLAPP motion is reviewed de novo. [Citation.]” (*Monster Energy Co. v. Schechter* (2019) 7 Cal.5th 781, 788.)

B. Protected Activity.

Olson contends that his complaint does not arise out of any protected activity, because: (1) the Yelp review did not pertain to a public issue; (2) he is not a public figure; and (3) the Yelp review was not made in connection with a judicial proceeding.

Protected activities under the anti-SLAPP statute include “any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law” (§ 425.16, subd. (e)(2).) However, they also include “any written or oral statement

or writing made in a place open to the public or a public forum in connection with an issue of public interest” (§ 425.16, subd. (e)(3).)

“[R]eviews posted to an Internet website meet this definition of protected activity. [Citations.]” (*Abir Cohen Treyzon Salo, LLP v. Lahiji* (2019) 40 Cal.App.5th 882, 888; see also *Bently Reserve LP v. Papaliolios* (2013) 218 Cal.App.4th 418, 425 [Yelp review of apartment building was “undoubtedly . . . protected activity.”]; *Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1366-1367 [negative Yelp review of dentist was protected activity].)

“It is settled that ‘Web sites accessible to the public . . . are “public forums” for purposes of the anti-SLAPP statute.’ [Citations.] [¶] . . . [A]lthough ‘not every Web site post involves a public issue’ [citation], consumer information that goes beyond a particular interaction between the parties and implicates matters of public concern that can affect many people is generally deemed to involve an issue of public interest for purposes of the anti-SLAPP statute. [Citations.]” (*Wong v. Jing, supra*, 189 Cal.App.4th at pp. 1366-1367.)

Olson argues that the Yelp review did not relate to an issue of public interest because he is a “private therapist” who “works with a relatively small group of clients” In this respect, however, he would seem to be similarly situated to a law firm (see *Abir Cohen Treyzon Salo, LLP v. Lahiji, supra*, 40 Cal.App.5th 887-888) or a dentist (see *Wong v. Jing, supra*, 189 Cal.App.4th at pp. 1366-1367). Moreover, Olson affirmatively alleged that “[Sardi] was referred to [Olson’s] counseling agency by the

court” He further concedes that he “is on the court’s referral list for anger management classes.” The fact that he accepts court appointments adds an additional layer of public interest to Sardi’s review. Even though the review did not pertain specifically to anger management classes, it would be of interest to the court, to potential anger management clients, and other potential clients.

Olson also argues that Sardi was not his client. Nevertheless, Sardi recounted alleged comments by his son, who *was* Olson’s client. And more generally, Sardi’s comments about the alleged impact that Olson’s counseling had had on him and his family would be of interest to potential clients. In *Abir Cohen Treyzon Salo, LLP v. Lahiji, supra*, 40 Cal.App.5th 882, the daughter of the client of a law firm was allowed to use the anti-SLAPP statute to protect her Yelp review of the firm.

Thus, the trial court correctly ruled that the complaint arose out protected activity.

C. *Probability of Prevailing.*

Olson contends that he established a probability of prevailing on his defamation cause of action.

The Supreme Court has “described this second step as a ‘summary-judgment-like procedure.’ [Citation.] The court does not weigh evidence or resolve conflicting factual claims. Its inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. It accepts the plaintiff’s evidence as true, and evaluates the defendant’s showing only to determine if it defeats the plaintiff’s claim as a matter of law. [Citation.] ‘[C]laims with

the requisite minimal merit may proceed.’ [Citation.]” (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384-385.)

“The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a tendency to injure or causes special damage.” (*Wong v. Jing, supra*, 189 Cal.App.4th at p. 1369.)

The only statement that Olson claimed was false was that “he wrote letters to the family court on [Mrs. Sardi’s] behalf that got [Sardi’s] son taken away from [him.]” And his only evidence that it was false was his testimony that: “I have reviewed the March [o]rder of the [c]ourt in the case of *Sardi v. Sardi*, and it clearly states that the [c]ourt gave sole legal custody of the child to the mother because of [Sardi]’s admitted actions in continuing to disobey court orders.”

Well, we have reviewed that order, too. It started with a series of findings. Among these, it found that Sardi had “admittedly violated” four specified court orders. However, it further found that Olson’s report was “most disturbing.” Based on the report, it found that Sardi had “an unreasonable and inexplicable tendency . . . to involve [his son] in details of the acrimonious relationship between his parents.” It then concluded that Sardi had violated court orders *and* that the presumption that joint custody was in the best interest of the child (see Fam. Code, § 3080) had been overcome. The only reasonable interpretation of this is that the court regarded Olson’s report as showing *either* a fifth violation of a court order (a nondisparagement order?) *or* that joint custody would be detrimental, *or both*.

There is no way to tell from the order itself whether the family law court would have changed custody even in the absence of Olson's report. The very fact that the court referred to the report in its order shows that it was, at the very minimum, a substantial factor in causing the court to change custody. Thus, the order falls short of proving that the report did not "g[e]t [Sardi's] son taken away from [him.]"

Olson also did not prove that any of the other statements in the Yelp review were false. In other words, he introduced no evidence that he did *not* take sides with Sardi's ex-wife; that she did *not* use her tears to sway him; that he did *not* refuse to read Sardi's emails; that he did *not* attempt to become a surrogate father to Sardi's son; that Sardi's son did *not* really hate going to his counseling sessions; that Sardi's son did *not* say that Olson kept trying to dig up negative information about Sardi to use against Sardi in court; or that he was *not* mercenary.

The closest he came to claiming that the Yelp review as a whole was false was his testimony that: "I was forced to obtain documents from the Los Angeles Superior Court. *In that process, I learned that [Sardi's counsel] was already well aware of the fact . . . that the statements made by Mr. Sardi on Yelp were also false.*" (Italics added.)

This is insufficient evidence that the statements were in fact false, for three reasons.

First of all, by its terms, it is based on what Olson learned from Los Angeles Superior Court documents. Thus, it simply restates his claim that the family court's order is the evidence — the *only* evidence — that the Yelp review was false. He would hardly

have needed to consult court records to know whether the other statements in the Yelp review were false; he would know that (if at all) of his own personal knowledge.

Second, it merely says that *Sardi's counsel* knew the Yelp review was false; it stops short of saying that it was *actually* false.

And third, it states an opinion without stating any of the facts on which that opinion is based. “[A]ffidavits or declarations setting forth only conclusions, opinions or ultimate facts are to be held insufficient. [Citation.] Even an expert’s opinion cannot rise to the dignity of substantial evidence if it is unsubstantiated by facts. [Citation.]” (*Atiya v. Di Bartolo* (1976) 63 Cal.App.3d 121, 126.)

In the argument on the motion in the trial court, Olson failed to explain how he could prove falsity. The trial court commented, “I’m not sure that you presented enough to show that you can prevail — that you have a lik[e]lihood o[r] reasonable probability of prevailing on any of the causes of action.” Olson replied, “Well, I think we have to continue to see what [Sardi’s] actions have been after the point of Yelp to see the scope and his intentions of what he’s trying to do I think it’s a broader picture other than what’s going on with Yelp. It’s a series of events that continue to happen” The trial court could reasonably take this as a concession that he could not prove the Yelp review false.

Olson does not contend that he showed a probability of prevailing on any of his other causes of action. He does not even say what they were. He says only that they arose from Sardi’s “defamatory statements.” Hence, he has forfeited any such

contention. (*W.S. v. S.T.* (2018) 20 Cal.App.5th 132, 149, fn. 7 [“Issues not raised in the appellant’s opening brief are deemed waived or abandoned.”].)

Finally, Olson complains that he has not been able to use discovery to substantiate his allegations. The filing of an anti-SLAPP motion automatically stays discovery. (§ 425.16, subd. (g).) “But ‘[c]ourts deciding anti-SLAPP motions . . . are empowered to mitigate their impact by ordering, where appropriate, “that specified discovery be conducted notwithstanding” the motion’s pendency.’ [Citation.]” (*Wilson v. Cable News Network, Inc.*, *supra*, 7 Cal.5th at pp. 891-892.) Olson did not ask the trial court to allow him to take discovery in connection with the motion. Accordingly, he cannot complain about lack of discovery.

In any event, once again, the bulk of the statements in the Yelp review were matters that — if false — he should have been able to deny based on his own personal knowledge.

For these reasons, the trial court correctly ruled that Olson had not shown a probability of prevailing.

IV

ATTORNEY FEES

The trial court awarded Sardi \$3,250 in attorney fees against Olson. Olson contends that this fee award should be reversed.

“[A] prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney’s fees and costs.” (§ 425.16, subd. (c)(1).) However, “a defendant

who brings a successful special motion to strike is entitled only to reasonable attorney fees, and not necessarily to the entire amount requested. [Citations.]” (*Cabral v. Martins* (2009) 177 Cal.App.4th 471, 491.)

“A trial court’s exercise of discretion concerning an award of attorney fees will not be reversed unless there is a manifest abuse of discretion. [Citation.] “‘The ‘experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong[’] — meaning that it abused its discretion. [Citations.]” [Citation.]” (*Nichols v. City of Taft* (2007) 155 Cal.App.4th 1233, 1239.)

Olson argues that Sardi’s papers were “devoid of any beneficial legal analysis.” Not so. Olson may disagree with that analysis, but as we have already held (see part III, *ante*), he is incorrect and Sardi is correct.

Olson also argues that Sardi’s “[c]ounsel’s claim that this particular case was more complicated than the normal anti-SLAPP case” was a “misrepresentation.” In support of Sardi’s request for fees, his attorney stated, among other things, that “[t]his matter is unique” As he went on to explain, however, he was talking largely about matters that led to the filing of the cross-complaint. He did not say that the anti-SLAPP motion was any more complicated than the usual anti-SLAPP motion.

He then went on to testify that his billing rate was \$325 an hour and that he had spent 16.2 hours on the case as a whole, for a total of \$5,265. The trial court reduced this

to 10 hours, for a total of \$3,250. Olson has not shown that this was unreasonable or excessive.

Thus, Olson has shown no reason to overturn the fee award.

V

DISPOSITION

The order appealed from is affirmed. Because Sardi has not appeared, we do not award any costs or attorney fees.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

FIELDS
J.

RAPHAEL
J.